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No. 83-297

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

ARMCO INC.,

Appellant,

v.

DAVID C. HARDESTY, JR.,
State Tax Commissioner of West Virgina,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

JOINT APPENDIX

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Appeal Docketed August 23, 1983
Probable Jurisdiction Noted December 12, 1983

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CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

January 12, 1978	Order of Circuit Court of Kanawha County granting permission to file Notice of Appeal from Administrative Decision of State Tax Commissioner; Notice of Appeal filed.
March 22, 1978	Order of Circuit Court of Kanawha County granting permission to file Answer to Notice of Appeal; Answer filed.
December 30, 1980	Memorandum of Opinion filed by Circuit Court of Kanawha County [text printed in Appendix B to Jurisdictional Statement at 25a].
July 20, 1981	Order and Judgment of Circuit Court of Kanawha County reversing Administrative Decision of State Tax Commissioner [text printed in Appendix B to Jurisdictional Statement at 33a].
November 4, 1981	Petition for Appeal to Supreme Court of Appeals of West Virginia and Petitioner's Designation of Record filed.
December 17, 1981	Order of Supreme Court of Appeals of West Virginia granting appeal.
May 25, 1983	Opinion and Final Order of Supreme Court of Appeals of West Virginia reversing and remanding Circuit Court judgment [text of Opinion printed in Appendix A to Jurisdictional Statement at 1a; text of Final Order printed in Appendix D to Jurisdictional Statement at 51a].

August 19, 1983	Notice of Appeal to Supreme Court of the United States filed in Supreme Court of Appeals of West Virginia [text printed in Appendix E to Jurisdictional Statement at 53a].
September 8, 1983	Order and Judgment of Circuit Court of Kanawha County vacating Circuit Court Order and Judgment of July 20, 1981 and affirming Administrative Decision of State Tax Commissioner.

PARTIAL TRANSCRIPT OF PROCEEDINGS BEFORE THE STATE TAX DEPARTMENT OF WEST VIRGINIA

STATE TAX DEPARTMENT

DOCKET NO. 77-105B

ARMCO STEEL CORPORATION

Petition for Reassessment
Business and Occupation Tax
File No. 31 020 0500 004

Transcript of proceedings had or testimony adduced in the above-styled case in the Office of Hearings and Appeals, 1217 Quarrier Street, Charleston, West Virginia, on Monday, May 23, 1977, at 10:00 o'clock a.m., pursuant to notice duly given by authority of the Tax Commissioner.

BEFORE:

FRANK SKINNER, Hearing Examiner

APPEARANCES:

G. THOMAS BATTLE, Attorney at Law
MICHAEL WINK, Attorney at Law
JAMES D. RYAN, Attorney at Law
CLAYTON CONDRY, Engineer
CARL OBEMEIER, Controller
FRANK DEITSCH, Controller
WILLIAM MARTIN, Purchasing Department
EUGENE J. DABKOWSKI, Senior Tax Administrator
E.D. CONAWAY, Chief Engineer-Robinson & Robinson Division NUS Corporation
HERBERT M. GEARY, District Sales Manager
ROBERT E. WEIFORD, Metal Product Division

STAFF:

MICHAEL STAJDUHAR, Tax Analyst
R. MICHAEL REED, Tax Analyst
WILLIAM C. MILLER, II, Tax Analyst
RUSSELL MILLER, Auditing Department
H. IRVIN HOFFMAN, State Auditing Department

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[3] EXAMINER SKINNER: There comes on for hearing a Business and Occupation Tax Assessment issued by Richard L. Dailey, former Tax Commissioner of the State of West Virginia, against Armco Steel Corporation. That Taxpayer has filed a timely Petition for Reassessment, due notice has been given of this hearing and the same is properly convened.

Armco Steel Corporation is represented by G. Thomas Battle, Attorney at Law of Charleston, West Virginia; Michael Wink, Attorney at Law, Charleston, West Virginia; James D. Ryan, Attorney for Armco; Eugene J. Dabkowski, Senior Tax Administrator of Armco; Carl Obemeier, Controller Armco; Frank Deitsch, Controller Armco; Clayton Condry, Armco Engineer; William Martin, Armco Purchasing Department; Herbert Wm. Geary, District Sales Manager; Robert E. Weiford, Metal Products Division.

The Tax Department is represented by Michael Stajduhar, Tax Analyst; R. Michael Reed, Tax Analyst; William C. Miller, II, Tax Analyst; Russell Miller, Auditing Department and by H. Irvin Hoffman, also of Auditing.

[4] This hearing comes on before Frank Skinner, Hearing Examiner, at 10:00 o'clock a.m. EDT on the 23rd day of May, 1977.

Before we proceed are there any preliminary matters or motions to be made by either party?

MR. REED: The State has none.

MR. BATTLE: None at this time.

EXAMINER SKINNER: Very well, Mr. Reed, if you would proceed with the State's case.

MR. REED: Thank you, Mr. Examiner. Pursuant to a field audit conducted by Mr. H. Irvin Hoffman, a Tax Examiner with the Auditing Section of the Business Tax Division, a Business and Occupation Tax Assessment was issued on January 6, 1977 by Richard L. Dailey, the then Tax Commissioner of the State of West Virginia, against Armco Steel Corporation of 703 Curtis Street, Middletown, Ohio 45043. The Assessment was issued according to the provisions of Section 7, Article 13, Chapter 11 of the Code of West Virginia 1931 as amended. The Assessment was for the period of January 1, 1970 through

December 31, 1975 for tax of $480,028.36 plus penalty of $237,942.54 for a [5] total assessed liability of $717,970.90. The Taxpayers' agent was served with notice of this assessment by certified mail on January 10, 1977.

Mr. Examiner, at this time the State would like to have marked collectively as State's Exhibit No. 1 and received into evidence as such a carbon copy of the assessment together with the original Return Receipt Card and a carbon copy of the cover letter. The State requests leave to withdraw these and to substitute photocopies therefore [sic]. The State is furnishing Mr. Battle with same.

EXAMINER SKINNER: Very well. The carbon copy of the original assessment in this matter, carbon copy of cover letter and original return receipt card will be marked as State's Exhibit No. 1 and admitted into evidence as such.

(WHEREUPON, the documents referred to were marked State's Exhibit No. 1 for purposes of identification and received in evidence.)

[6] MR. REED: Mr. Examiner, at this time the State would like to have marked for identification as State's Exhibit No. 2 and received into evidence as such an original of an agreement consenting to an extension of the statute of limitations, dated January 7, 1976 by and between Richard L. Dailey, the then Tax Commissioner of the State of West Virginia and the Taxpayer Petitioner, Armco Steel Corporation. This agreement constitutes a one year extension of the five year statute of limitations for collecting Business and Occupation Tax and Consumer Sales and Service Tax for the year 1970, pursuant to Section 19 of Article 2 of Chapter 55 of the Code. The Statute of limitations itself is also provided by that section. It should be noted that this extension agreement is signed by Frederick C. Van Scoyoc, identified as Assistant Controller and Director of Taxes of and for Armco Steel Corporation.

The State requests leave again to withdraw this original and substitute a photocopy therefore [sic], and the State is furnishing Mr. Battle with a photocopy of the same.

[7] EXAMINER SKINNER: The agreement extending the statute of limitation period dated January 7, 1976 between the Taxpayer and the State Tax Department will be marked as State's Exhibit No. 2 and admitted into evidence as such with leave granted to withdraw the original and substitute a photocopy therefore [sic].

(WHEREUPON, the document referred to was marked State's Exhibit No. 2 for purposes of identification and received in evidence.)

MR. REED: At this time, the State would like to have marked for identification collectively as State's Exhibit No. 3 and received into evidence as such the original Audit Working Papers as compiled by the Auditing Section of the Business Tax Division, and the State requests leave to withdraw the original and substitute a photocopy therefore [sic]. Again, the State is furnishing Mr. Battle with a photocopy of same. I believe, Mr. Battle has been furnished with a photocopy of the same prior to this hearing.

[8] EXAMINER SKINNER: Very well. The Audit Work Papers prepared in this matter by the Auditing Section of the Business Tax Division will be marked as State's Exhibit No. 3 and introduced into evidence as such with leave granted to substitute a photocopy for the original.

MR. BATTLE: May I ask just a moment, to have, to make sure this is—

EXAMINER SKINNER: Certainly. Off the record for a second.

(WHEREUPON, discussion was had off the record.)

(WHEREUPON, the documents referred to were marked State's Exhibit No. 3 for purposes of identification and received in evidence.)

EXAMINER SKINNER: On the record. Mr. Reed, you may continue.

MR. REED: Thank you, Mr. Examiner. At this time the State would like to have marked for identification collectively as State's Exhibit No. 4 and received into [9] evidence as such the

original Annual Business and Occupation Tax Returns filed by the Taxpayer for each of the years in the assessment period, namely, calendar years 1970 through 1975. Each of these returns are signed by Mr. Van Scoyoc, Assistant Controller of the Taxpayer. Again, the State requests leave to withdraw these originals and substitute photocopies therefore [sic]. The State is furnishing Mr. Battle with photocopies of the same.

EXAMINER SKINNER: Mr. Battle, would you care to view these originals before they are admitted?

MR. BATTLE: I'll look at the copies.

EXAMINER SKINNER: Off the record.

(WHEREUPON, discussion was had off the record.)

EXAMINER SKINNER: On the record. Do the returns seem to be in order, Mr. Battle?

MR. BATTLE: Yes. They appear to be copies.

EXAMINER SKINNER: Very well, the original Business and Occupation Tax Returns of the Taxpayer for the audit period will be marked as State's Exhibit No. 4 and received as such and leave will be granted to substitute [10] photocopies for the originals.

(WHEREUPON, the document referred to was marked State's Exhibit No. 4 for purposes of identification and received in evidence.)

EXAMINER SKINNER: Mr. Reed.

MR. REED: The envelope containing the Taxpayer's Petition for Reassessment was postmarked February 7, 1977. As stated previously, the certified return receipt card for the notice of assessment indicates Taxpayer's agent received the notice of assessment on January 10, 1977 and therefore the Taxpayer's Petition for Reassessment was timely filed within 30 days after receipt of the notice of assessment pursuant to Code Chapter 11, Article 13, Section 7B.

Mr. Examiner, at this time the State would like to have marked for identification as State's Exhibit No. 5 and received into evidence as such a photocopy of the Taxpayer's timely filed Petition for Reassessment. The State, again, requests

leave to withdraw this **[11]** photocopy and substitute another photocopy therefore [sic]. The State is furnishing Mr. Battle with photocopy of same.

EXAMINER SKINNER: Very well, a photocopy of the Taxpayer's Petition for Reassessment in this matter will be marked as State's Exhibit No. 5 and admitted into evidence as such and leave will be granted to substitute another photocopy.

> (WHEREUPON, the documents referred to were marked State's Exhibit No. 5 for purposes of identification and received in evidence.)

MR. REED: It should be noted that the Taxpayer, in its petition, contested the following portions of the assessment for the following reasons. The assessment fails to substitute an accurate value for coal produced in the year 1974 for the erroneous value reported by Petitioner on its return for that year. The assessment erroneously includes certain sales in interstate commerce not properly taxable, apparently due to lack of sufficient nexus with the State. There are other alleged errors listed as alleged errors, Numbers 1, 3 and 6 in the **[12]** Petition. Petitioner submits that reasonable cause exists for waiver of the penalty on the grounds that:

> "It has consistently filed timely Business and Occupation Tax Returns with the State of of [sic] West Virginia, reporting its tax based upon a fair and reasonable analysis of the law and available regulations and consistent with prior audit examinations conducted by representatives of the State Tax Commissioner."

The Taxpayer, Petitioner, Armco Steel Corporation was created under the laws of the State of Ohio on or about June 29, 1917 and was qualified to transact business and hold property within this state on October 8, 1938. During the assessment period, the Taxpayer had several divisions with activities within the State of West Virginia. The State would like to attempt a summary at this time of those type of activities.

First, the Steel Division, Coal Operations. The Taxpayer severes [sic] and prepares coal within West Virginia that is shipped to the Taxpayer's out-of-state steel manufacturing plants and uses or consumes the coal therein. The Taxpayer also severes [sic] and prepares coal within this state that is used or consumed in the Taxpayers tipples or coal preparation plants within this state and **[13]** heat drying preparation of other coal.

The Taxpayer also purchases some coal and prepares it within this State for use in manufacturing steel at its out-of-state locations or in West Virginia tipples in preparing other coal. The Taxpayer makes a few retail sales of coal to local residents, to local board of educations and to employees, and makes a few retail sales of safety equipment from its coal supply houses. The Taxpayer's coal operations also make a few wholesale sales of scrap.

Now, as to the Steel Divisions, non-coal operations, Taxpayer's Steel Division makes wholesale sales of sheet steel and through its Union Wire Rope subdivision of Wire Rope, resells Wire Rope through that subdivision.

The Taxpayer's Metal Products Division makes wholesale sales of corregated [sic] pipe, guard rails and prefabricated buildings and at times installs pipe and metal buildings as well as making a few retail sales of pipe.

The Taxpayer's National Supply Corporation **[14]** Division sells oil field supplies, such as tubular stocks, items used in pumping, etc. Most sales are at wholesale, but some are at retail.

Finally, the Construction Products Division makes a few sales, and most, if not all, are wholesale sales.

Mr. Examiner, it is the State's position that the tax and penalty are due as assessed because, first, as to coal production in the years 1970, 1971, 1972, 1973 and 1975 the Taxpayer understated the production value of coal produced within this state and shipped to its steel manufacturing plants located outside the State of West Virginia. Also, in each of the years in the audit period, 1970 through 1975 the Taxpayer totally failed to report the production value of coal consumed or used in

heat drying of other coal at the Taxpayer's coal preparation plants or tipples located within this state. In the year 1974 Taxpayer failed to report total coal production tons shipped to its out-of-state plants.

As to manufacturing in each year in the assessment period other than the year 1975, that is, in **[15]** the years 1970 through 1974 the Taxpayer totally failed to report the manufacturing value of coal purchased and prepared at its West Virginia preparation plants.

As to wholesale sales in each of the years in the assessment period, that is, the years 1970 through 1975, the Taxpayer totally failed to report the following wholesale sales to West Virginia customers by its divisions having sufficient nexus with the state. One, sales of scrap materials by Steel Divisions of coal operations. Second, sales of dealer sales aids by its Metal Products Division.

As to penalty the Taxpayer's petition fails to state reasonable cause for waiver of the penalty, especially penalty attributed to unreported production value of coal used to prepare other coal, and especially as to unreported manufacturing value of coal purchased and then prepared by the Taxpayer. The penalty in question attached automatically by statute, was not imposed after the fact by the Tax Commissioner. The penalty is a non-fraud civil deficiency or delinquency penalty. There are separate statutory civil fraud penalties **[16]** and criminal penalties and neither of these were imposed; therefore, the State submits that good faith, unintentional oversight, ignorance of the law or the like, do not constitute reasonable cause for waiver of the penalty. Once the penalty has automatically attached the Tax Commissioner, according to the statute, may, and the wording of the statute is may, not shall, waive all or any part of the penalty for reasonable cause both stated and proven by the Taxpayer.

Mr. Examiner, the State has nothing further at this time.

EXAMINER SKINNER: Very well then, Mr. Battle, if you would care to proceed with the Taxpayer's case.

MR. BATTLE: Mr. Examiner, as indicated by Mr. Reed, the assessment pending against Armco Steel Corporation can be

broken down into two, perhaps, three general categories. Under the general heading of Coal or Coal Division of Armco, there is the issue of the value of the coal produced by Armco and shipped to its plants, steel plants, outside of West Virginia, the value of the coal produced and consumed in its processing and preparation [17] plants, the value of coal purchased and processed. Then, in the area of sales of completed products into West Virginia there is the question of whether the sales in issue, are properly taxable by the State of West Virginia under the Business and Occupation Tax law.

First, with respect to the value of coal produced by Armco at its coal mining operations in West Virginia, Armco takes no exception to the adjustment in value made for the years 1970, 1971, 1972, 1973 and 1975. Armco believes that the Auditor and the State Tax Commissioner, in his assessment, has used for those years the best measure of the value of that coal, which is the price of coal of equal or better quality which was sold by another company operating mines in the vicinity of the Armco Steel Company operations.

For the year 1974, we believe that the value as reported by Armco was reported in error and is excessive and that the same source should be utilized for determining the market value of coal produced in that year that was used for the other years during the audit period. We believe this requirement is clear under the statute and [18] the regulations.

With respect to consumed coal, that is coal that was produced by Armco and utilized in its coal preparation operations and to some extent, in its boilers, we do not contest the concept that that coal was produced and is properly subject to the Business and Occupation Tax. We do take exception to the value assigned to that coal for the year 1974 and are willing to recognize the State's value as determined from the same source as the—that I mentioned before as far as the value for other years, other than 1974.

The coal that was purchased and manufactured and processed by Armco through its coal preparation plant in West Virginia is recognized as properly taxable under the manufacturing classification. Our exception, again, is taken to the

value assigned for the other years during the audit recognized as being valid and we take no exception to those.

Now, with respect to sales of products, finished products, by Armco Steel Corporation to West Virginia, we believe that there are substantial questions **[19]** whether the transactions involved constitute sales as that term is defined under the Business and Occupation Tax law and consequently, whether the activity in question is subject to the Business and Occupation Tax at all. In addition, we believe that there is insufficient activity in West Virginia to justify the State assessing and collecting Business and Occupation Tax on sales of the Steel Division and on sales of the metal buildings of the Metal Products Division.

With respect to the penalty that Mr. Reed referred to, we believe that the penalty should not be invoked against Armco Steel Corporation in this case. The majority of the liability in this assessment deals with—relates to coal value and the value of coal. Up until 1974 Armco reported its coal value on the basis, approximating the basis, that was arrived at as a result of prior examinations of its company by the State of West Virginia. With respect to the year 1974, we believe that the Business and Occupation Tax is substantially over paid and that overpayment should be recognized and a realistic value assigned, realistic and accurate value **[20]** assigned, to the coal produced by Armco for that year.

With respect to destination sales, or so-called interstate sales, the Metal Products Division sales were largely reported under the retail classification in error and under the audit were reclassified to wholesale. The Steel Division sales were not reported, being treated as interstate sales and not subject to the Business and Occupation Tax, which we believe was a valid and proper position under the Business and Occupation Tax law and the case law, as it exists.

We would like to proceed this morning, Mr. Examiner, with, initially, with evidence regarding the coal issues and thereafter, when that is completed, deal with the issues relating to the sales.

EXAMINER SKINNER: Very well.

[Portion of Transcript concerning the coal issues (pp. 20-165) omitted in printing.]

[165] EXAMINER SKINNER: Mr. Battle.

MR. BATTLE: Mr. Examiner, that's all the questions I have on the coal issue. I'd like to move along now to the issue relating to sales, if I might.

[166] EXAMINER SKINNER: Certainly.

MR. BATTLE: I'd like to ask Mr. Geary.

(Witness sworn.)

THEREUPON came, HERBERT M. GEARY called as a witness on behalf of the Petitioner, who, having been first duly sworn according to law, testified as follows:

Direct Examination By Mr. Battle:

Q Would you, please, state your name, age and place of residence?

A My name is Herbert M. Geary, 54 years of age. I reside in Cincinnati, Ohio.

Q Mr. Geary, by whom are you employed and for how long have you been so employed?

A I'm employed by Armco Steel Corporation, and I will have 30 years in October 2nd, of this year.

Q What is your position with Armco Steel, at the present time and perhaps I should, you should state the position you held during the period of '70 through '75, **[167]** if you will?

A I was District Manager in our Atlanta District Office, in 1970 and July 14, of '72, I became District Manager of our Cincinnati District Sales Office and responsible for the sale of Steel Division Products in that district.

Q The pending assessment against Armco Steel Corporation, Mr. Geary, in addition to reclassifying certain sales by Metal Products Division from retail to wholesale which I mentioned earlier and making certain mathematical corrections, included as taxable sales shipments into West Virginia by the Steel Division and by the Union Wire Rope Division. I

wonder if you would describe, briefly, the products that are sold by those divisions and the nature of the sales organization and the Metal Products Division also?

A Those are three distinct and separate divisions and are individually responsible for the sales of the products produced by those divisions. The steel group, there are nine steel plants in seven states produce practically all steel mill products with emphasis on high **[168]** quality steels for specific needs.

Union Wire Rope, with a mill in Kansas City and warehouses in Ashland, Kentucky and Pittsburgh, Pennsylvania, produce wire rope slings and assessories [sic].

The Metal Products Division produces a variety of construction products, corregated [sic] metal pipe, retaining wall, guard rail, plastic sewer pipe, flood gates, buildings and so forth.

Q You mentioned that the steel group had nine steel plants, steel manufacturing plants. Are any of those plants located in West Virginia?

A No.

Q With regard to the Steel Division and the Union Wire Rope Division, let me say here for the record, that we have a following witness representing the Metal Products Division, so I'll rely on his testimony for the Metal Products Division. With respect to the other two, the steel group and the Union Wire Rope, do either of those have any sales offices located in West Virginia?

A No.

Q Do they have any sales or service employees **[169]** that reside in West Virginia?

A None.

Q Do either of those have any inventory that they maintain in West Virginia?

A None.

Q How are orders for goods that are shipped into West Virginia to customers of the Steel Division, Union Wire Rope, how are those orders obtained?

A They are obtained by telephone or personal solicitation, solicitation at purchasing headquarters located outside West Virginia. At this point it might be of interest and I'd like to

mention the fact that the Cincinnati Office in 1976 shipped 7.5 percent of our tons and 8 percent of our dollars into West Virginia, a small amount compared to the other states that we cover. It might be of interest also, to mention that three accounts, namely American Car and Foundry, a Chessie System and American Motors accounted for 77 percent of those tons and orders are solicited in St. Louis, Baltimore and Milwaukee for those accounts American Car and Foundry, Chessie Corporation and American Motors. American Car and **[170]** Foundry is solicited at St. Charles, Missouri out of our St. Louis District Office, American Motors is solicited in Milwaukee and Chessie is solicited by our Baltimore.

Q So that, take American Car and Foundry for example, your St. Louis office would call on the American Car and Foundry Headquarters there for the sale of steel that would be consumed and used by their plant that is located in Huntington, West Virginia?

A Right. We are called on, occasionally, to investigate complaints or strictly service work there.

Q Mr. Geary, I'd like to show you now a form and ask if you would identify that for me, please?

A This is a form on which we make quotations to our customers.

Q Does that form—excuse me.

MR. BATTLE: I'd like to submit this form as Petitioner's Exhibit No. 5. I'll present Mr. Reed a copy.

EXAMINER SKINNER: Very well, Armco's quotation form, as just described by the Taxpayer's Counsel, will be marked as Petitioner's Exhibit No. 5 and admitted into evidence as such.

> **[171]** (WHEREUPON, the document referred to was marked Petitioner's Exhibit No. 5 for purposes of identification and received in evidence.)

By Mr. Battle:

Q You said, I believe, Mr. Geary, you used this form to submit quotations to customers of the Steel Division?

A Right.

Q Does this contain also the conditions upon which the sales would be made?

A Yes, on the reverse side of this form.

Q Are those conditions called to the attention of the customer at the time that you or one of your salesmen is making initial contact with the customer?

A Of course, it's spelled out very clearly in the quotation itself and it's discussed from time to time in the solicitation of the steel business.

Q Let me also hand you now another form and ask if you will identify that?

[172] A This is an order acknowledgement form. It's actually an acknowledgement form for the customer and on the reverse side are also the conditions of sale.

MR. BATTLE: I'd like to submit that, Mr. Examiner, as Petitioner's Exhibit No. 6.

EXAMINER SKINNER: Armco Steel Corporation Order Acknowledgement form will be marked as Petitioner's Exhibit No. 6 and introduced into evidence as such.

(WHEREUPON, the document referred to was marked Petitioner's Exhibit No. 6 for purposes of identification and received in evidence.)

By Mr. Battle:

Q Does that also contain the conditions of sale on the reverse side of the form that is sent to the customer?

A Yes, it does.

Q I believe you said you were associated with the Cincinnati Office?

A That's right.

[173] Q District office. Does that office cover or have responsibility for the entire State of West Virginia?

A Oh, no. Our Pittsburgh Office also covers part of this state.

Q Does the Pittsburgh Office operate in essentially the same manner as the Cincinnati Office in terms of sales?

A Yes, they do. They have two salesmen travelling out of their district as we do coming down here to Huntington and the Charleston area.

Q So that out of the Cincinnati District there are two salesmen that visit West Virginia and out of the Pittsburgh District Office, there are two salesmen that visit their geographic territory that is assigned to this state?

A That is correct.

Q Are any of these salesmen residents of West Virginia?

A No.

Q Do these salesmen have a specific geographic territory assigned to them?

[174] A Yes, they do.

Q Would any of them have only West Virginia as their sales territory?

A No, they have other business in Ohio and Indiana, Kentucky.

Q Pennsylvania?

A Right, in the case of Pittsburgh, right.

Q What would you say would be the average frequency of visits by these salesmen into West Virginia?

A Generally speaking, every four to six weeks. I understand, one salesman in Pittsburgh calls in Wheeling, West Virginia, twice a month.

Q Do you know how many salesmen in the Union Wire Rope Division have responsibility for West Virginia?

A Yes, there are three.

Q Where are they located?

A Well, in Ashland, Kentucky and Pittsburgh, Pennsylvania or Greensboro, North Carolina.

Q Do you know the frequency of their visits, as far as West Virginia business is concerned?

A Yes, once or twice a month.

[175] Q Are any of those three salesmen residents of West Virginia?

A No.

Q Now, in the normal course of operating the sales offices,

are orders placed directly with the salesmen at the time they make one of these visits to customers in West Virginia?

A Be a rare case, not normally at all. It would be strictly a coincidence if they were able to carry an order out of the purchasing agents office.

Q The orders then, are generally submitted, of course, at the convenience of the customer and it doesn't always coincide with the visit of the salesman?

A That's correct.

Q Do these salesmen have any specific authority to accept or reject orders?

A No, they don't. The conditions of sale specifically say that all orders are subject to acceptance at the sellers office, that's the home office and that's at Middletown, Ohio[.]

Q So, that's under the terms and conditions of **[176]** sale and the orders are accepted at the office in Middletown, Ohio, which is the general Headquarters of Armco Steel Corporation, is that correct?

A That's right.

Q Once one of these orders is accepted, how are the goods generally shipped to customers in West Virginia?

A By either common carrier or truck or rail.

Q Now, taking the Steel Division, where would those goods come from, generally?

A In this area, mostly from Ashland, Kentucky; Middletown, Ohio or Marion, Ohio.

Q Those are the locations of three of the nine manufacturing plants?

A Right.

Q How about the Union Wire Rope, which I believe you said had a manufacturing plant in Kansas City?

A Yes, the products are manufactured in Kansas City, but they have warehouses in Pittsburgh and in Ashland, Kentucky.

Q So that goods purchased by customers in West Virginia would likely be shipped out of either the Ashland **[177]** or the Pittsburgh Warehouse?

A Right. And orders would be entered there also, and if they had stock on hand they would be made up and shipped right from there.

Q Now, are these salesmen that you referred to actually four Steel Divisions, two from the Cincinnati Office and two from the Pittsburgh Office, do they solicit or deal with sales only of the Steel Division Products as distinguished from Union Wire Rope Products or Metal Products Division Products?

A The salesman sells only the products for his particular division.

Q Now, does either the Steel Division or Union Wire Rope Division own or rent any motor vehicles which are licensed in West Virginia?

A No.

Q Do either of those divisions install, service or repair any products that are sold by it to customers in West Virginia?

A No, they don't.

Q Do either of those divisions have any service **[178]** personnel residing in the State of West Virginia?

A No.

MR. BATTLE: That's all the questions I have.

EXAMINER SKINNER: Mr. Reed.

Cross-Examination by Mr. Reed:

Q What types of sales follow-up activities would occur following a sale, if any? After a sale has been completed, would any of these non-resident salesmen come back into the state?

A To get another order and also to make sure everything was all right, and they would be called back in if the quality was less than standard, for instance. But a follow-up call, of course, would be made to get more business.

Q About how often again would they come into the state?

A About every four to six weeks.

Q Do you ever deliver products, will Steel Division or Union

Wire Rope deliver products into this state in your own trucks?
[179] A In our own trucks?

Q Own vehicles?

A Contract carriers and commercial carriers only, to my knowledge.

Q Would the Union Wire Rope Division ever sell products similar to products sold by the Steel Products Division or Steel Division?

A No, they wouldn't.

Q Or vice-versa?

A No, sir.

MR. REED: I have no further questions.

EXAMINER SKINNER: Mr. Battle.

MR. BATTLE: One further point, Mr. Geary.

Redirect Examination by Mr. Battle:

Q How are the sales made in terms of f.o.b. point or transfer of title? Where does the title of goods that are sold to customers in West Virginia actually pass?

A Regardless of where they are the title passes at the point of delivery to the carrier and is so stated in the Conditions of Sale.

[180] Q That's item 2 of the Conditions of Sale, passage of title. Would you read that first paragraph, please?

A "Title to the product sold hereunder shall pass upon delivery to the carrier at the point of shipment."

Q Is the customer billed for the freight?

A Mostly, we ship freight collect. We do, on occasions, ship prepaid and bill to the customer.

Q So, the customer ends up paying whichever way?

A That's right, ultimately, he pays the freight.

MR. BATTLE: That's all I have.

EXAMINER SKINNER: Mr. Geary, you may stand down.

(Witness stood aside.)

MR. BATTLE: I'd like to now call Mr. Weiford.

(Witness sworn.)

THEREUPON came, ROBERT E. WEIFORD called as a witness on behalf of the Petitioner, who, having been first duly sworn according to law, testified **[181]** as follows:

Direct Examination by Mr. Battle:

Q Would you state your name, age and place of residence, please, sir?

A Robert Ernest Weiford. I'm 42 years old. I reside in St. Albans, West Virginia.

Q Mr. Weiford, by whom are you employed now, and how long have you been so employed?

A I'm employed by Armco Steel Corporation, Metal Products Division. October 3rd, I will complete my 14th year.

Q I wonder if you would give me a brief description of your job with Metal Products Division?

A My job is to promote sales and service of fabricated steel products, predominantly corregated [sic] steel products.

Q What is the sales organization of your division, Metal Products Division?

A Metal Products Division is broken down into four regions and I'm a member of an employee of Great **[182]** Lakes Region-Columbus District, being headquartered in Columbus, Ohio, consisting of the states of Ohio and West Virginia.

Q Do you maintain an office, the Metal Products Division, that is maintain an office in West Virginia?

A Yes, we have an office at 332 Sixth Avenue, South Charleston, West Virginia.

Q How many employees are at that South Charleston Office, Mr. Weiford, and what are their basic duties?

A Well, I'm Senior Sales Engineer and we have two Sales Engineers, Mr. Bibby and Mr. Sernick and we have one secretary, Mrs. Edens. The titles or responsibilities of the Sales Engineers are equivalent and the secretary, of course, does secretarial work.

Q During the years of this assessment, 1970 through 1975, did you have these three Sales Engineers there?

A No, we only had the two, Mr. Bibby and myself.

Q During that six year period then you only had two Sales Engineers, is that correct?

A Yes, that is correct.

Q I wonder if you would give a general description of the products that are sold by the Metal Products Division?

[183] A Well, essentially, we term them construction products. Our predominant products would be culvert pipe, ranging anywhere from 6 inches in diameter to 52 foot span. We also sell plastic and fiberglass reinforced plastics to the utility market, you might say.

Q Now, do those two salesmen that were working out of the South Charleston Office, yourself and Mr. Bibby in the year '70 and '75, between the two of you, did you cover the entire State of West Virginia?

A The state was broken down less than northern and eastern panhandles to essentially a north and south territory with Mr. Bibby covering the northern half of the state and me covering the southern half. I had additional responsibility, with what I call specifying agencies, being the West Virginia Department of Highways and United States Corps of Engineers.

Q Now, did you and Mr. Bibby or anybody associated with the South Charleston Office of Metal Products Division, have any authorization or responsibility for selling products other than those you just described, that is the construction products of your division?

[184] A No.

Q What about the, what about the metal buildings, Mr. Geary mentioned those?

A That is actually a separate department within the division and our steel buildings are handled through franchised agents. So, no, I have no responsibility for steel buildings, whatsoever.

Q Does anybody at the South Charleston Office have any responsibility for steel buildings?

A No.

MR. BATTLE: Mr. Examiner, in reviewing the audit and more particularly the sales figures for the Metal Products Division, there was no breakdown between the buildings, the metal buildings and the Construction Products sales. I would like to ask leave to submit such a schedule showing that

breakdown for the six years involved. I do not have that breakdown here this afternoon, but we'd like to submit that, tying it into the audit figure of the total.

EXAMINER SKINNER: Very well, I think that could be helpful and the record, this breakdown between metal **[185]** buildings and the construction products will be marked and received into evidence as Petitioner's Exhibit No. 7 when it is received. How long do you think it will take you to get that in, Mr. Battle?

MR. BATTLE: Ten days.

EXAMINER SKINNER: Very well then, ten days from the date of this hearing that will be due.

(WHEREUPON, the audit figure referred to will be marked Petitioner's Exhibit No. 7 upon receipt, for purposes of identification and received in evidence.)

By Mr. Battle:

Q Now, Mr. Weiford, do any of the South Charleston office personnel provide any contact or service to the Steel Division that Mr. Geary described or the Union Wire Rope Division with respect to products that are sold by those divisions?

A No.

Q Have you or any of the employees at the **[186]** South Charleston office ever been requested to check any credit or collect past due accounts for one of the other divisions?

A No.

Q Does the Metal Products Division and, more particularly, your department the Construction Products utilize this same terms and conditions of sale as are used by the Steel Division and Union Wire Rope Division?

A Yes, sir, I think you'll find on the back of our quotation form similar terms and conditions of sale.

Q I'll hand you now two forms and ask if you will identify those, please?

A Yes, sir, the first one you handed me is our quotation form which is clearly stated and it includes the conditions of sale on the back and the second form you handed me is an office order write-up form with conditions of sale on the back.

MR. BATTLE: Mr. Examiner, I'd like to submit these two documents as Petitioner's Exhibits No. 8 and 9. I'm giving Mr. Reed copies of the same.

EXAMINER SKINNER: Very well, the Armco Steel **[187]** Corporation Quotation Form, Metal Product Division will be marked as Petitioner's Exhibit No. 8 and received into evidence as such, and the Armco Steel Corporation Metal Products Division Order Write-up form will be marked as Petitioner's Exhibit No. 9 and introduced into evidence as such.

(WHEREUPON, the documents referred to were makred [sic] Petitioner's Exhibits Nos. 8 and 9 for purposes of identification and received in evidence.)

By Mr. Battle:

Q Mr. Weiford, under the conditions of sale appearing on these documents, is it true that title to the products sold to customers pass upon delivery to the carrier at the point of shipment?

A Yes, sir.

Q Where, generally, are goods shipped to West Virginia customers, that is, goods consisting of the construction of products sold by you and your fellow sales engineers from the South Charleston office?

[188] A I'm sorry, Mr. Battle, I don't understand your question.

Q I'm sorry. From what points would goods be shipped to customers in West Virginia resulting from the activities of your work or Mr. Bibby's work?

A Most of our products would be shipped out of our Summit Plant, which is outside of Ashland, Kentucky.

Q Is that Summit, Kentucky?

A Summit, Kentucky and Middletown, Ohio. We do also ship on a lesser scale from Baltimore, Maryland and Raleigh, North Carolina.

Q Is any billing done by the South Charleston office, that is,

do you send bills to customers from your South Charleston office?

A No.

Q How about payments, are any payments made there?

A No.

Q Now, you stated earlier that the Metal Buildings Department of Metal Products Division was not part of the activities of your South Charleston office. **[189]** Do you know where those items would be shipped from to a customer in West Virginia?

A Yes, they would, essentially, come from Washington Court House, Ohio.

Q Is that where their manufacturing or assembly plant is?

A That's where they're fabricated.

Q To your knowledge, do the terms and conditions of sale as described on the Quotation Form and the Write-up Form submitted here, are those terms and conditions of sale generally applicable to all Armco products?

A I would have to answer generally, yes.

MR. BATTLE: That's all the questions I have, Mr. Examiner.

EXAMINER SKINNER: Mr. Reed.

Cross-Examination by Mr. Reed:

Q As to the steel and metal buildings, I believe you stated that those could be handled only through franchised agents?

A Yes, sir.

[190] Q Are any of those franchised agents residents of West Virginia?

A Yes.

Q Does the Metal Products Division have any personnel that services any of the products sold by it in West Virginia?

A I'm sorry Mr. Reed, I don't understand.

Q Any service personnel?

A From South Charleston, West Virginia?

Q Yes.

A Servicing Metal buildings?

Q Yes. Metal buildings or the other type of products, excuse me, not the metal buildings, but the construction products?

A Yes.

Q Would the South Charleston office have service personnel that would service the metal buildings?

A No.

MR. REED: I have no further questions.

Cross-Examination by Mr. Stajduhar:

[191] Q Mr. Weiford, would there be any sales by the Metal Products Division to a West Virginia customer that would not be solicited by either yourself or some other salesman operating out of the South Charleston office?

A Yes.

Q How would those sales be solicited?

A Listed?

Q Solicited?

A By someone such as myself. For instance, on an example would be American Electric Power in New York City and they would solicit, they would receive the purchase order and they would order the material and quite possibly ship it into West Virginia.

Q Let's say that for some reason the products were not quite to specifications, there was some problems, who would do the servicing on those products in West Virginia?

A Myself or someone from my office.

MR. STAJDUHAR: I have no further questions.

EXAMINER SKINNER: Mr. Battle.

Redirect Examination **[192]** by Mr. Battle:

Q Do you know how many franchise agents deal with Armco Metal Buildings in West Virginia?

A I know of two and that's Wilson of St. Albans and Tri-State of Huntington, West Virginia.

Q Do you happen to know what the arrangement is with respect to, the arrangement between Wilson or Tri-State or Armco? Do they buy the buildings from Armco and resell them? Are you familiar with the terms of their agreement, franchise agreements?

A I'm not familiar with i.. I would just as soon not comment.

MR. BATTLE: That's all the questions I have for Mr. Weiford.

EXAMINER SKINNER: Very well then, I think you may step down now.

(Witness stood aside.)

EXAMINER SKINNER: I assume at this time we have completed the presentation of the evidence by both sides. Mr. Battle, you have completed your presentation of the evidence?

[193] MR. BATTLE: Just one moment. Yes, we have.

EXAMINER SKINNER: Let's go off the record.

(WHEREUPON, discussion was had off the record.)

EXAMINER SKINNER: On the record, Mr. Reed, did you have something you wish to ask for?

MR. REED: Yes, Mr. Examiner. The State would like in the form of a motion, request three different types of documents or schedules be submitted at the time its initial brief is submitted in order to clarify the factual situation, especially, in light of the fact the Taxpayer's witnesses themselves have testified to the fact that there was quite a fluctuation of prices in '74.

So, the first request would go to the Taxpayer for furnishing a copy of the contracts with General Coal Company. The second would go to the average purchase prices under the General Coal Company contract for the year 1972 through 1975. I believe the witness has testified as to the year 1974. The third request would go to the source documents for the Taxpayer's average composit [sic] figure for the year 1974.

[194] EXAMINER SKINNER: Very well. Mr. Battle, if you, since off the record we discussed the possibility of briefs and you indicated you would be favorable to the idea of filing briefs in this matter, what I will do is set an initial 30 day period for the filing of your brief, 30 days starting to run from tomorrow which would make it the 24th of June. And, when that brief is submitted, please include these three pieces of

information that the State's representative has requested. They can simply be attached to the brief and submitted in that manner.

After the 30 days have run or at the time of the submission of the Taxpayer's brief, Mr. Reed will be given 30 days in which to file a reply brief. And finally, Mr. Battle, you will be given 15 days from the date of your receipt of the State's reply brief to file any reply in this matter, that you would deem appropriate.

Is there anything further that either party can think of that should be discussed at this time, before we go off the record?

MR. REED: I have nothing.

EXAMINER SKINNER: Mr. Battle?

[195] MR. BATTLE: No, I don't have anything further to submit at this time.

EXAMINER SKINNER: Very well then, this hearing will be considered as submitted pending the receipt of the previously mentioned submissions and the briefs.

(WHEREUPON, the hearing in the above-entitled matter was submitted.)

Subsequent to the time of the hearing, Petitioner's Exhibits Number 10 & 11 were submitted and received into evidence as part of the record.

[Reporter's Certificate omitted in printing.]